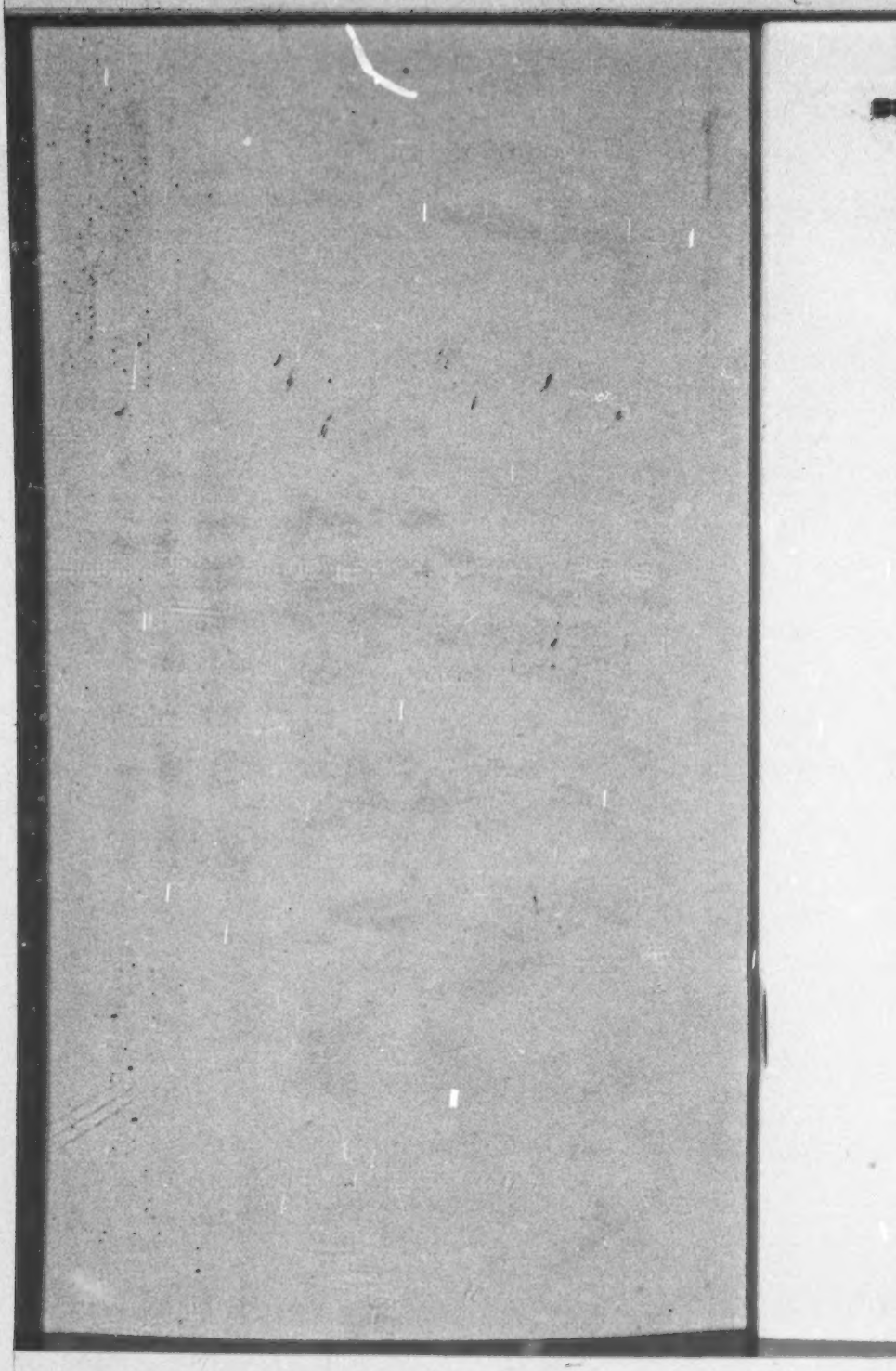

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1154

JOHN P. FOLEY, JR., *et al.*,

Petitioners,

vs.

BLAIR & CO., INC., *et al.*,

Respondents.

BRIEF OF PETITIONERS

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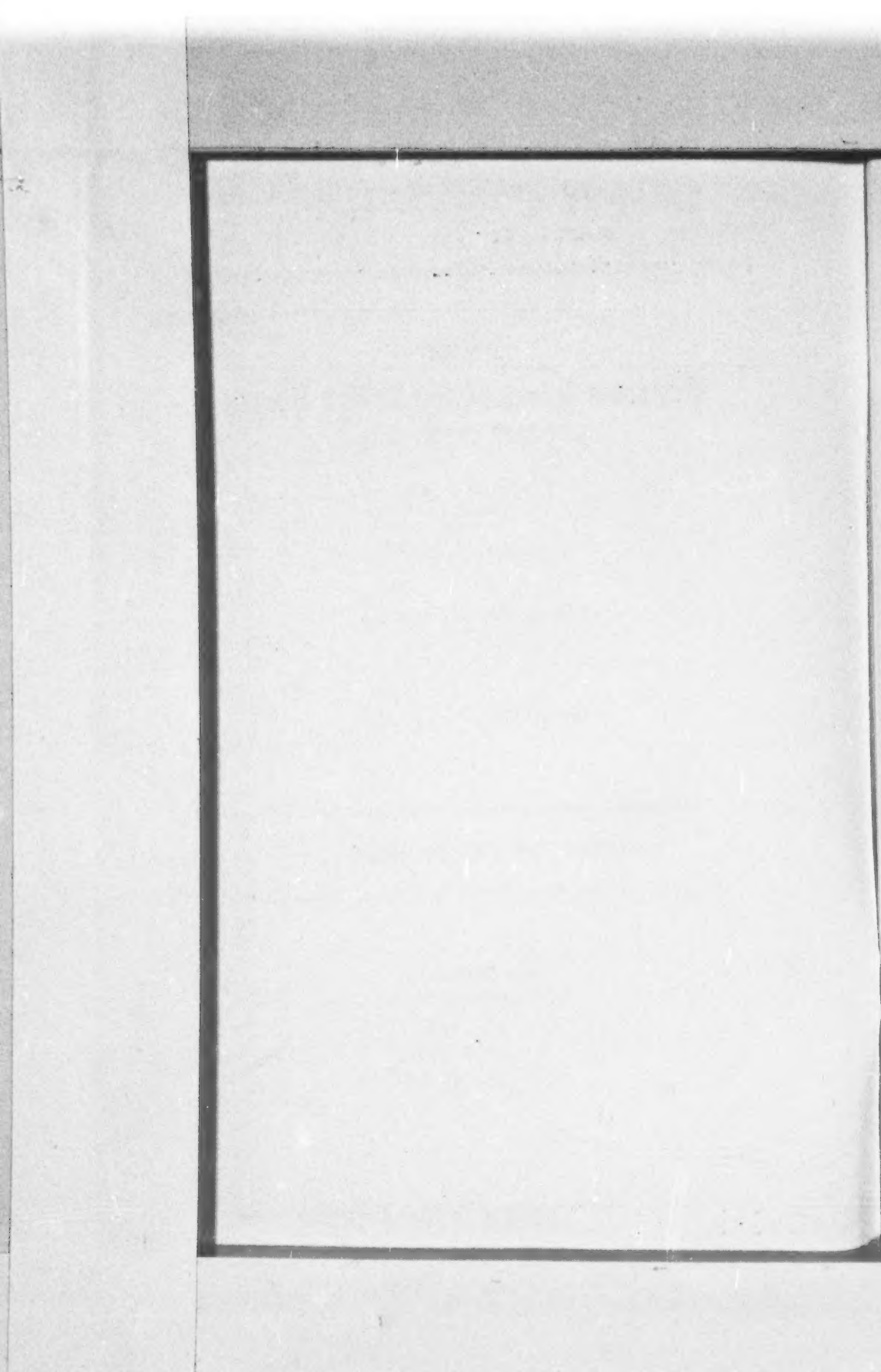

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Official Report of Opinion in the Court Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 471 F. 2d 178 (1972). The dissenting opinion commences at 471 F. 2d 184.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to issue the discretionary writ of certiorari was invoked pursuant to the Judiciary Code of the United States, 28 U.S.C. § 1254(1), by the filing of a Petition for

writ of certiorari on February 21, 1973 to review the judgment of the United States Court of Appeals for the Second Circuit entered December 11, 1972, upon the grounds that the United States Court of Appeals for the Second Circuit has decided an important question of Federal law arising under Section 3(a)(5) of the Bankruptcy Act (11 U.S.C. § 21(a)(5)) which has not been but should be settled by the Supreme Court of the United States, and has decided it by a divided Court in a manner in conflict with every other decision rendered by any Court on the same subject.

Statutory Provision

The statute interpreted by the United States Court of Appeals for the Second Circuit is Section 3(a)(5) of the Bankruptcy Act (11 U.S.C. § 21(a)(5)):

> "Acts of Bankruptcy by a person shall consist of his having . . .
>
> (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

Question Presented

Although this proceeding involved other issues at its inception, only one issue remains for the determination by this Court, to wit:

Was the designation of a person named as a Liquidating Agent with the broad powers equivalent to those of a receiver or trustee, to take charge of the assets of BLAIR & Co., INC., for the purpose of liquidating of that concern, an Act of Bankruptcy within the scope of Section 3(a)(5) of the Bankruptcy Act (11 U.S.C. § 21(a)(5))?

Statement of Case

The basic facts out of which this issue arises are essentially simple and undisputed. In September, 1970, BLAIR & Co., INC., a Delaware corporation engaged in the stock brokerage business on Wall Street as well as in any other States throughout the nation, decided to terminate its business by liquidation (A9, 10). It entered into a contract with the NEW YORK STOCK EXCHANGE by the terms of which the NEW YORK STOCK EXCHANGE was given the power to appoint a Liquidator to take charge and conduct this liquidation (A34). On or about September 25, 1970, PATRICK E. SCORESE was appointed Liquidator (A10), and took over all of the affairs of BLAIR & Co., INC., under a broad Power of Attorney, containing all of the powers, and more, of any receiver or trustee that could have been appointed by a Court, or by a contract, except that he served without bond and with no control by any Court or any principal. All powers enumerated in the contract and the Power of Attorney (A34-A65) were strictly within the discretion and control of the Liquidator, who was donominated in the contract as a "Liquidator", but in the Power of Attorney as an "Agent". The power was "coupled with an interest and irrevocable". (A64)

. It was, and is the contention of Petitioners that regardless of nomenclature, the intent of the designation, the purpose of the appointment, and the powers bestowed upon MR. SCORESE, brought the fact of his appointment within the scope of § 3(a)(5) of the Bankruptcy Act, and constituted an Act of Bankruptcy.

POINT I

A history of the enactment of the successive acts leading to the present §3(a)(5) clearly demonstrates the intention of the Congress to have been to reserve paramount jurisdiction of the liquidation of insolvent concerns to the Federal judiciary pursuant to the Bankruptcy Act to the exclusion of other means of administration of liquidations.

Many years ago, this Court declared:

> "The operation of the bankruptcy laws of the United States cannot be defeated by an insolvent commercial corporation applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."
>
> *In Re Watts,* 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933

The history of the evolution of the present §3(a)(5) is succinctly set forth in COLLIER ON BANKRUPTCY Vol. 1, ¶3.501, et seq. pp. 491-497. Prior to 1903, the use of a receivership instead of an Assignment for the Benefit of Creditors was an effective device used to avoid the rule as to paramount and exclusive jurisdiction of liquidations of insolvent companies under the Bankruptcy Act, and in that year, Congress amended the fourth Act of Bankruptcy so as to add to the General Assignment for the Benefit of Creditors as an Act of Bankruptcy the language

> "or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

Unfortunately, the wording of this Act gave rise to many difficulties, and in 1926, Congress attempted to remedy the situation by rephrasing and renumbering this provision subdivision (5), and separating it from the General Assignment clause to read:

> ". . . while insolvent, a receiver or trustee has been appointed, or put in charge of his property."

Two significant items of this amendment must be pointed out, to wit: Congress deleted the words, "under the laws of a state, of a territory, or of the United States", but continued the words "put in charge of his property" which had appeared in the 1903 Act.

The 1926 amendment, however, continued to present difficulties, and in 1938, Section 3(a)(5) of the Bankruptcy Act was amended to its present state to read as follows:

> "§3. Acts of Bankruptcy. a. Acts of bankruptcy by a person shall consist of his having . . . . .
>
> (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

It is interesting to note that COLLIER states in its text, "This should result in a curb on receiverships", (V.1 ¶3.502 p. 497) citing that the House of Representatives had stated in enacting this new definition:

> "The amendment was made to curb abuses which had arisen in equity receiverships, in which a court was persuaded to appoint a receiver on the theory that the business was momentarily embarrassed and would work itself out. It often developed that the company was hopelessly insolvent in the bankruptcy sense, but if four months had elapsed no proceedings in bankruptcy could be taken and creditors suffered heavy losses."

The Senate Committee on the Judiciary likewise stated in its report on this amendment that the intent was to broaden "the scope of the act of bankruptcy in order to reach the widening prevalent abuse of collusive equity receiverships." (Senate Report No. 1916, 75th Congress, Third Session 12, 1938).

Attention must also be called to the fact that in this third enactment of this Act of Bankruptcy, the phrase "to take charge of his property" remained consistently in the Act.

It is clear from the various changes that took place in the enactments hereinabove noted, that, based upon the premise that liquidations of insolvent companies should be within the paramount and exclusive control of the Federal Judiciary to the exclusion of other means of liquidation, the intention of Congress at all times was to enact a law which would avoid the evil of liquidation of insolvent companies by any method controlled or instigated by its management, and to enable creditors, who are, and at all times were, the real parties in interest in any liquidation, to petition into the Bankruptcy Courts any insolvency situation which evaded the creditors' right to control and supervise the liquidation. All of the other Acts of Bankruptcy were clearly keyed to the very purpose of the law of Bankruptcy, to wit: to liquidate the assets of an insolvent debtor and make a fair distribution among all of its creditors equally. The right to supersede a General Assignment for the Benefit of Creditors under State law, to set aside a fraudulent conveyance, or a preference, are all indications of the intent of the Bankruptcy Act to effectuate that purpose. When prior to 1903, the device of a receivership was resorted to as a means of evasion of the paramount jurisdiction of the Federal Court, the first provision superseding receiverships

and trusteeships, was enacted, and the fact that the phrase, "put in charge of his property" was consistently retained throughout the three enactments points to the fact that it was not identity of the persons appointed to liquidate the business that was the determining factor, but it was the "putting in charge" of the insolvent debtor's assets which became the basic act which justified the invoking of Federal jurisdiction. In that sense, the instant case may be said to be one of first impression, in that apparently, nobody had ever considered appointing an agent, instead of a trustee "to take charge of the property" of an insolvent debtor. Heretofore, instruments appointing liquidators always referred to trustees, and it is clear that the situation in the instant case was deliberately set up as an attempt to evade the jurisdiction of the Bankruptcy Act as clearly as it had probably been done prior to 1903, through the appointment of "collusive equity receiverships". Certainly, the appointment of a person to take charge of the liquidation of a stock brokerage firm with all of the powers given to the liquidator in this case, can be, and probably would be as collusive as any "collusive equity receivership", as no provision can be found in the agreement or Power of Attorney that the liquidator, whether he be agent or otherwise, was required to account to, or report to anybody at all as to his stewardship, was required to post a bond for the performance of his duties, had neither power, nor authority, nor any instructions to investigate or pursue any defalcations, waste, preferences, or fraudulent conveyances made by the former management*, nor is there any indication in this case that the Liquidator whether he be agent, trustee or receiver ever intended to do any of these things, or to account to creditors for his liquidation, to the corporation

* Approximately 10 million dollars in secured demand notes and subordinated debentures had been withdrawn from Blair within one year prior to the petition, (A107, 108) of which $1,400,000 belonged to the Chairman of the Board of Directors (A128, 129).

on whose behalf he was appointed, or even to the NEW YORK STOCK EXCHANGE who appointed him. This is a situation far worse than any abuse of an equity receivership, or potentially more collusive than any equity receivership could possibly be. It was the equivalent of the appointment of a trustee with no rights to equitable relief to which any beneficiary of a trust would be entitled, and is clearly the object of Congress's intent in enacting the Statute, even in its earlier form, and much more so in its present form.

The intent of the enactment of §3(a)(5) in all of its forms was clearly echoed by JUDGE WEINFELD in the celebrated case of IN RE BONNIE CLASSICS INC., 116 F. Supp. 646 (U.S.D.C., S.D.N.Y.) where he stated:

> "Were the position contended for by the alleged bankrupt to be upheld it would at once be the effective means of defeating the exclusive jurisdiction of the bankruptcy courts. It would enable directors whose administration brought a corporation to its insolvent plight to take charge of the corporate assets and their distribution to the exclusion of creditors and deny the latter the right to select their own trustee. It would provide a neat way for derelict directors to gain immunity from the investigative and discovery techniques and summary procedures set up under the Bankruptcy Act. In sum, it would deprive creditors of the comprehensive powers of the Bankruptcy Act aimed at the expeditious recovery of assets which may have been diverted or transferred from an insolvent estate. The history of the Bankruptcy Act makes it clear that no such untoward result was contemplated by §3, sub.a(5)."

POINT II

Although denominated a liquidator or liquidating agent, the party appointed was in effect a receiver or trustee of Blair & Co., Inc.

In the instant case, MR. SCORESE was not at any time acting on behalf of BLAIR or its Board of Directors or under their instructions, as an agent normally would. Although the document setting forth his powers was denominated a Power of Attorney, a reading of the document itself clearly reveals that MR. SCORESE was the ultimate authority himself in making any determination as to the method and the ultimate goal of liquidation. The fact is that all but one of the directors of BLAIR & Co., INC., resigned upon his appointment, and MR. SCORESE has been the sole judge and guide in the entire process of liquidation to this very day. He was given full authority to do so in the document granting his powers. He had every prerogative that any Receiver or a Trustee could possibly have, and the fact that he was called a Liquidating Agent, instead of a Trustee or a Receiver, was simply a matter of nomenclature, and scrutiny of his powers, rather than the title, reveals no doubt of the fact that MR. SCORESE was in full charge or full control of BLAIR & Co., INC., with the same force and effect as if he had been named in the document outlining his powers, as a Receiver or as a Trustee.

It is extremely interesting to note that throughout the entire contract between the NEW YORK STOCK EXCHANGE (A34-A46) the term, "a[illegible]" does not appear. Commencing with paragraph VI of that agreement, where the Exchange was given the right "to appoint such person as it may choose as Liquidator of the business of the corporation",

the contract constantly refers to a "Liquidator", and not to an "agent". In paragraph VIII, it is expressly agreed that

> "the Liquidator shall take control of the business and property of the corporation for the purpose of liquidating the business of the corporation."

He was by this contract to have sole and complete control of the liquidation:

> "i.) *He* shall promptly take such steps as *he* may deem practical . . .
>
> ii.) *He* shall have power to retain public independent accountants, etc.
>
> iii.) *He* shall . . . assert and collect and settle all claims and rights of the corporation.
>
> iv.) *He* shall pay any claim against the corporation *considered by him* to be a valid claim . . .
>
> v.) *He* shall take such other steps *as he deems necessary or appropriate* to liquidate the business of the corporation." (italics ours).

It is clear from this language of the basic contract that the party contemplated was to have sole and complete control of the liquidation without supervision, and to that extent, he comes clearly within the definition and the scope of a Receiver or a Trustee in charge of a liquidation.

In the Power of Attorney form, (A48-A64) it is significant to note in the opening of the document itself that the party to be designated is still referred to as "Liquidator", and only subsequently as "Agent", but a reading of the powers granted in this document clearly reveals that the person designated, whether a Liquidator or an Agent, is given every power usually granted to a Trustee or to a Receiver, whichever he might be called, with absolutely no provision therein for control, direction, supervision or even

the expression of an opinion by a principal. It is significant to note that in banking transactions, he is given the right to open and maintain bank accounts *in his name alone,* (A50) *to sign corporation checks,* (A50) *to sell* bonds and shares, (A53) *to sell* personal *property,* (A56) *to sell* real estate, (A57) "to execute . . . any . . . instrument or document *which the Agent may think useful* . . . for the liquidation of the business of the corporation" (A62), "to do any other act or acts . . . which the corporation is able to do and which the Agent shall think to be desirable or necessary for the liquidation of the business" (A63).

Lastly, it is important to point out that the Power of Attorney concluded with "This power of attorney is a power coupled with an interest and is irrevocable". (A64).

In determining whether Mr. Scorese was an Agent or a Trustee, or even both, it has been held in California and in Maryland that the name given to the intermediary was not conclusive.

> *Hayden Plan Co.* v. *Wood* (1929) 275 P. 248, 97 Cal. App. 1;
>
> *Gittings* v. *Morris,* (1929) 144 A. 836, 927, 156 Md. 565.

In Colorado, a transfer by a debtor for the benefit of creditors was treated as creating a trust and common law assignment, although the document was in the language of a grant of power of attorney.

> *McMullin* v. *Keogh-Doyle Meat Co.,* (1935) 42 P.2d 463, 96 Colo. 298.

> "The contractual and extremely personal nature of agency makes it a relationship dependent on the continued existence of both parties *and on the will of the principal.* . . . A trust, being impersonal and

partaking of the nature of a conveyance, is not usually dependent on the survival of the parties, nor is it revocable by the settlor in the absence of power expressly reserved."

• • • • •

An agent is subject to the control and direction of his principal, whereas neither the trustor nor the beneficiary of a trust has such power unless it was expressly reserved or granted in the trust instrument. Agency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and guidance by the settlor or cestui only to a limited extent and when expressly provided for. If a transaction is called a trust but gives too much power to the settlor and leaves the so-called trustee a mere tool, it has been held that there is in reality a mere agency. (WARSCO v. OSHKOSH SAVINGS & TRUST CO., (1924) 196 N.W. 829, 183 Wis. 156. 160, 161.). . . . The lack of such complete control is frequently persuasive evidence that a questionable relationship is not an agency.

• • • • •

In some cases the question is whether the initiator of a transaction intended a trust or an agency. *The answer will depend not so much on the language used, as on the characteristics and purposes of the relationship.*" (Italic ours).

Bogert on Trusts, §15 p. 73-76.

Although the power of attorney upon which the appointment of MR. SCORESE is based purports to name him as an Agent, the characteristics and purposes of the relationship clearly identify MR. SCORESE as a Trustee, primarily because control of his activities is clearly delineated as being completely within his own discretion, and not subject to the will of any principal. A reading of the express powers set forth in the power of attorney (A49-A64) coupled with

those contained in paragraph VIII of the contract (A41-A42), clearly reveals that MR. SCORESE had the ultimate and complete control of all decisions and all acts to be performed by him in liquidating BLAIR & Co., INC. Although named an Agent for BLAIR, he was accountable to nobody, and was to all intents and purposes vested with all of the powers that would ordinarily repose in the officers and directors of the corporation. He was in all respects a czar. Nobody could overrule him, and he was under no obligation to consult with anybody in arriving at his decisions and performing his functions. In that respect, he was completely a Trustee, and no sense an Agent. In that same regard, he was a Receiver with powers greater than a Receiver, in that he had no obligation to account to a Court or to any of the parties involved in the transaction who had appointed him. The only power that existed to which MR. SCORESE could be compelled to make obeisance, was the Federal Judiciary by reason of the paramount and exclusive jurisdiction created by the Bankruptcy Act.

POINT III

A proper construction and interpretation of §3 (a) (5) impels the conclusion that the appointment of a liquidator to take charge and liquidate the assets of Blair came within the scope of §3 (a) (5) of the Bankruptcy Act.

In interpreting § 3(a)(5) of the Bankruptcy Act so as to exclude the appointment of MR. SCORESE from the scope of that Section, Respondent and the Court below expressly repudiate the language set forth in the text of the two leading commentaries on the law of Bankruptcy, to wit: COLLIER and REMINGTON.

COLLIER ON BANKRUPTCY, Vol. 1, ¶3.502 states:

"'Trustee' means much the same as 'receiver', the nomenclature varying in different states. *The term is also intended,* no doubt, *to include liquidation agents generally,* who though performing much the same functions as receivers, may not be appointed by a Court." (citing Matter of R. V. SMITH Co., INC., 55 Am. B.R. (N.S.) 758, 38 F. Supp. 57.)

§ 3.503 (p. 502):

"It is not essential that there be an appointment of a receiver by a court; *an executed agreement to wind up the affairs of a corporation* and make an assignment of all its property to the directors as trustees to close up its business comes within this act of bankruptcy." Haubtman & Loeb v. Dunbar Molasses Co. (C.C.A., 5th Cir.), 8 Am. B.R. (N.S.) 22, 13 F. (2d) 335; In re Bennett Shoe Co. (D.C. Conn.), 15 Am. B.R. 497, 140 Fed. 687; In re Hercules Atkin Co., Ltd. (D.C. Pa.), 13 Am. B.R. 369, 133 Fed. 813; In re Lisk Mfg. Co. (D.C.N.Y.), 21 Am. B.R. 674, 167 Fed. 411; In re Electric Supply Co. (D.C. Ga.), 23 Am. B.R. 647, 175 Fed. 612; Vassar Foundry Co. v. Whiting Corp. (C.C.A., 6th Cir.), 5 Am. B.R. (N.S.) 262, 2 F. (2d) 240. (emphasis supplied)

* * * * *

(P. 503)

"It can be asserted as a general proposition that the appointment of any officer, for the purpose of winding up insolvent partnerships or corporations, which substantially abridges or deprives creditors of the right to a trustee of their own choosing, or of the greater right to compel prorating between all creditors of the same class, or any other right given them by the Bankruptcy Act, will amount to the fifth act of bankruptcy, if the requirements of insolvency or inability to pay debts as they mature

be present, and if the appointment be within the four-month period."

In re Electric Supply Co. (D.C. Ga.), 23 AM. B.R. 647, 175 Fed. 612.

See also *Fish* v. *East* (C.C.A. 10th, 1940), 44 AM. B.R. (N.S.) 206, 114 F. (2d) 177.

COLLIER'S BANKRUPTCY MANUAL, p. 90, uses the same language.

* * * * *

REMINGTON ON BANKRUPTCY, Vol. 1, § 157, p. 247:

"Court proceedings are not essential to this act of bankruptcy. It can occur through statutory winding up and liquidating without any court action whatsoever." (citing Re Hercules Atkin Co. 133 F. 813, 13 ABR 369 (1904, DC. Pa.); Re: C.H. Bennett Shoe Co. 140 F. 687, 15 ABR 497 (1905 DC. Conn.).

§ 160, P. 249:

"The intention, as appears from the discussion in preceding sections of this subdivision, and particularly from the history of the provision, was to cover all instances of like character regardless of technical designation. *A trusteeship created or set up without any court procedure may* accordingly *be deemed commission of this act of* bankruptcy." (emphasis supplied)

The thrust of Petitioners' position on this appeal may be best characterized by reference to the dissenting opinion of JUDGE TIMBERS below, when he stated:

". . . we are asked to find a narrow purpose behind an Act of Congress, despite the failure of Congress to demonstrate that narrow purpose in the statutory language through the use of drafting devices frequently employed. Where the effect of such

> a reading is to hold in favor of a party whose position relies on language expressly eliminated from the Statute, and thereby to defeat a party whose position falls squarely within the remaining language, I should have thought that we would construe the amendment in the most sensible, rather than the narrowest, manner." (471 F.2d 178, 185)

The argument was made by Respondent and followed by JUDGE FRIENDLY in his Opinion below that a Receiver, in order to be such, had to be judicially appointed by a Court. Initially, it must be pointed out that even the words, "under the laws of the State, of a territory, or of the United States," which was deleted by the Congress in 1926 from the Act, did not require that the Receiver or Trustee be judicially appointed. There is no reason to reject the concept that a Trustee or a Receiver could be appointed by contract, or by stipulation between parties to a controversy. Neither Respondent, nor the Court below has pointed to a Statute of any State, territory or the United States that specifically requires a Receiver to be appointed by a Court in order to be denominated as such. The writer has been unable to locate such a Statute. It would seem that as long as a person was agreed upon, or appointed, to take within his possession and control, or to take charge of, assets for the purpose of preserving or liquidating them, if such appointment was not contrary to the laws of the State, territory or of the United States, it would come within the scope of the language of the previous Statute, without regard to whether or not such a person was appointed by a Court. Certainly, it must be clearly recognized that a Trustee can be appointed by will, by contract or by any Trust instrument without a reference to any judicial proceeding. As quoted above, the use of the terms "receiver" and "trustee" are often interchangeable, depending upon the particular State in which the phrase is

used. No reason has been shown, nor can be shown why MR. SCORESE's designation in the contract between the NEW YORK STOCK EXCHANGE and BLAIR as a liquidating receiver or trustee would have rendered the document in any manner invalid, or different in its ultimate purpose or effect. He would have had identically the same powers he was granted as a Liquidator or Agent.

However, the fact remains that the language relied upon as the basis for the Court's holding below that the Liquidator could not come within the definition of a receiver was expressly repealed by the Congress and a proper interpretation of the particular Section in view of its repeal should permit the inclusion of a Liquidator appointed by contract as coming within the scope of § 3(a)(5), even if this interpretation is based upon the acceptance of the concept of the Liquidator as a trustee, instead of as a receiver. The prerequisite of judicial appointment should be disregarded completely, as it is based upon a misinterpretation of even the very language repealed.

Nor do past precedents reveal that persons "put in charge" of an insolvent debtor's property had to be designated or named in any particular manner, or even appointed by contract. Thus, in Pennsylvania, the District Court held that the appointment of a Sheriff constituted an Act of Bankruptcy, stating:

> "It is made an act of bankruptcy to put a receiver or trustee in charge of the property of a corporation under State laws by § 3, subd. 4, and the substitution of the sheriff to effect the same result will not defeat the provisions of the act.
>
> "In this proceeding, the property of the insolvent corporation is not placed in the hands of a receiver or trustee by that name, but it is so in effect, because the sheriff, after a sale of the property on execution, is required to distribute the net proceeds

> among the creditors of the corporation according to the rules established in cases of insolvency of individuals, and the same as a receiver or trustee would have been required to do under the law relating to insolvent debtors in the state."
>
> Re *International Coal Min. Co.* 143 F. 665, 16 ABR 311 (1906, DC Pa.)

In *Fish* v. *East* (CCA 10th 1940) 44 AM. B. R. (N.S.) 206, 114 F. (2d) 177, a turnover order granted in the Bankruptcy of a parent corporation directing its subsidiary to turn over substantially all its property to the trustee of the parent corporation was held to constitute "the appointment of a receiver or trustee" to take charge of the subsidiary's property, and thus be an Act of Bankruptcy within the meaning of § 3(a)(5).

The contention has been made below that an essential element of a receivership or trusteeship was lacking in that MR. SCORESE was alleged not to have been given title to BLAIR'S assets. This contention disregards the fact that MR. SCORESE was given the right to not only sell any of the assets, but to incumber, pledge and hypothecate personal property (A56), to quitclaim, surrender, mortgage or incumber real estate (A57), to pay claims of customers and other creditors, all within his own discretion, (A50) all of which placed it within his power to dispose of all of the assets of BLAIR & Co., INC., giving good title therefor. Moreover, this contention overlooks the very important fact that the Power of Attorney was specifically denominated as "a power coupled with an interest and is irrevocable." (A64) Exactly what was meant by that provision can only be guessed at, but, certainly, the interest partook of some element of title.

> "In order that a power may be irrevocable because it is coupled with an interest, it is necessary that the interest be in the subject matter of the power and not in the proceeds which will arise from the exercise of power:

"By the phrase 'coupled with an interest', is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate. (Citing TAYLOR v. BURNS, 203 US 120, 51 L ed 116, 27 S. Ct. 40)

Williston on Contracts, Third Edition Vol. 3, § 280 p. 300

An agent in possession of property, which is the subject of his agency, has been held to be a quasi trustee and subject to the control of equity in being compelled to account for his stewardship.

Marvin v. Brooks, 94 N. Y. 71, 80

While it cannot be argued that actual legal title was directly vested in MR. SCORESE, he unquestionably had some of the elements of title, whether by virtue of the interest referred to above, or whether by reason of his obligation as a quasi trustee in actual possession of BLAIR'S assets.

Nor is the contention of the Respondent that the absence of actual legal title disqualifies him from being considered a receiver or a trustee borne out by decided cases on the subject.

Thus, in Missouri, a receiver appointed for a railroad corporation was held to be an officer of the Court with power to act under its direction, but he did not have title to the corporate property.

Jennings Sewer Dist. of St. Louis County v. Pitcairn, (1945) 187 S. W. 2d 750, 238 Mo. App. 704

In Pennsylvania it was held that the receiver of an insolvent corporation does not get legal title, but only "a kind of equitable title".

Blum Bros. v. Girard Nat. Bank (1915)
93 A. 940, 248 Pa. 148, Ann. Cas. 1916D, 609

In South Carolina, it was held that a receiver for an insolvent has no title, title remaining in the insolvent.

Hannon v. Mechanics Building & Loan Ass'n of Spartanburg, (1935) 180 S.E. 873, 177 S. C. 153, 100 A.L.R. 928

Respondents must admit, and it must be accepted as true, that Petitioners could have taken an intermediate step by applying for a State Court Receivership in the State of New Jersey, where BLAIR had moved its offices, solely upon the grounds of BLAIR's insolvency, and after a State Court Receiver had been appointed, an Involuntary Petition in Bankruptcy could have been filed without any possibility of objection thereto as an Act of Bankruptcy. Petitioner elected, with apparently sufficient justification to satisfy a very erudite Referee in Bankruptcy, and a United States District Court Judge to consider the appointment of MR. SCORESE the equivalent of the appointment of a receiver or the designation of a trustee to take charge of BLAIR's assets, and filed the Involuntary Petition on that ground, along with two others, not pertinent before this Court.

The substance, to wit: the appointment of a designee, who was certainly the equivalent of a receiver, and was unquestionably a trustee, to take charge of the assets of BLAIR was undisputed. Whatever criticism may be raised by Respondents as to the procedure taken, there can be no denial of the substantial fact of what had occurred.

In *Pepper* v. *Litton*, 308 U.S. 295, 303 (1939), MR. JUSTICE DOUGLAS stated:

> "Courts of bankruptcy are constituted by §§ 1 and 2 of the Bankruptcy Act (30 Stat. 544) and by the latter section are invested 'with such jurisdiction at

> law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' Consequently this Court has held that for many purposes 'courts of bankruptcy are essentially courts of equity.' *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 240. By virtue of § 2 a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applied the principles and rules of equity jurisprudence. *Larson* v. *First State Bank*, 21 F. 2d 936, 938 . . . In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U.S. 205, 217.
>
> The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, *that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.*" (Italics ours)

In *Bank of Marin* v. *England*, 385 U.S. 99 (1966), this Court held that:

> "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."

MR. JUSTICE FRIENDLY, in the court below, summarily dismissed the decision In re: R. V. SMITH Co., 38 F. Supp. 57, 62 (W.D. Okla. 1941) by simply stating:

> "We do not find its reasoning to be persuasive."

It is impossible to guess why JUDGE FRIENDLY did not find its reasoning to be persuasive, but the fact is that the SMITH case followed the learned Opinion of this Court in

Pepper v. *Litton, supra,* by two years and stated succinctly that:

> "The court will not stand on a technicality with reference to form, when substance is alleged . . ."

In that case, the Involuntary Petition alleged the Act of Bankruptcy to be an Assignment for the Benefit of Creditors. It did not allege as an Act of Bankruptcy § 3(a)(5) involved in this proceeding. The Court doubted whether the instruments executed by R. V. SMITH Co., constituted an Assignment for the Benefit of Creditors, but did feel that the document came within the scope of § 3(a)(5) which was not alleged as an Act of Bankruptcy. Had the Court adhered to form, rather than substance, the Pefition would have had to be dismissed. However, the Court declined to dismiss, and following the substance of what had been alleged and found, upheld the Petition and declared the Debtor a Bankrupt.

In the dissenting Opinion below, JUDGE TIMBERS quoted and adopted the express language of JUDGE WEINFELD, referring to him as "a wise and comprehending Judge", in construing § 3(a)(5) of the Bankruptcy Act, stating:

> "It is not required that the transferee of the property be formally 'appointed' as 'trustee' by a ceremonial document referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a 'trustee to take charge of his property' under § 3, sub. a(5). By filing the petition for its dissolution the corporation 'procured, permitted or suffered voluntarily • • • the appointment' of such a trustee. Any other construction would defeat the objectives of the Bankruptcy

Act and abort the broad powers of the courts of bankruptcy intended for the uniform adminstration of insolvent estates." In re Bonnie Classics, Inc., 116 F. Supp. 646, 648 (S.D.N.Y. 1953) (Weinfeld, J.)."

Can this Court of Equity truly hold that the mere esignation of a Liquidator with all of the powers given to im cannot be held to be a trustee, merely because of the orm used in the designation?

In making its determination, this Court must consider he effect of its interpretation of the act in question. If his Court were to uphold the right of management of an nsolvent company to avoid the paramount and exclusive urisdiction of the Bankruptcy Courts by the mere designaion of the person entrusted with its liquidation as an Agent, or some such similar title other than specifically that f receiver or trustee, it would immediately condone the reation of a broad highway for fraud and evasion of the ights of creditors in the liquidation of insolvent companies nd would countenance a technique whereby officers and irectors of an insolvent company could waste and dissipate ts assets, and control the method of liquidation so as to prevent and avoid interrogation, investigation and prosecuion for mismanagement, fraudulent conveyances, preferenial transfers and similar acts of fraud and deceit. Such n interpretation would circumvent the very amendments f the particular Act of Bankruptcy which had already been nacted.

The public interest in this interpretation becomes even nore imperative because the debtor in this instance was a tockbroker, which was itself a fiduciary insofar as its ustomers were concerned, and has been subject to broad

and complex regulations under the laws of the United States, but exempted from the coverage of some of these laws by special arrangement with the NEW YORK STOCK EXCHANGE, which may be said to have had a very vital interest in preventing too deep an investigation into the management of the debtor prior to its demise. Certainly, and particularly in the case of a stockbroker, the public interest should demand liquidation under the supervision of the Federal Courts, rather than liquidation by a hand-picked designee of the NEW YORK STOCK EXCHANGE. This Court must consider whether it would so interpret § 3(a)(5) of the Bankruptcy Act, as to permit the liquidation of an insolvent company in any other industry by a hand-picked designee of a trade association of which the insolvent debtor was a member, merely because the designee was named an "agent", instead of a receiver, trustee, or Assignee for the Benefit of Creditors. Could this Court interpret and construe § 3(a)(5) of the Bankruptcy Act as authority for the proposition that a receivership created by an Order of a State Court, an Assignment for the Benefit of Creditors executed by virtue of a State Statute, or a Deed of Trust executed by virtue of common law of the several States, could all be superseded pursuant to the authority granted by § 3 (a)(5) of the Bankruptcy Act, yet a hand-picked designee selected by the management of an insolvent company, or by a trade association, or organization of which it was a member, could not be superseded because the person designated was named as an "agent", or some such similar title, not specifically set forth in the Act itself?

Certainly, it cannot be held that the intention of Congress was to permit so absurd and unjust a concept.

CONCLUSION

The designation of the liquidator coming within the scope of §3(a)(5) of the Bankruptcy Act, the determination of the Court of Appeals dismissing the involuntary petition in bankruptcy, should be reversed, and adjudication of Blair & Co., Inc., reinstated.

Respectfully Submitted,

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